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ELECTION COMMISSION, INDIA

NOTIFICATION.

New Delhi, the 14th March 1955

S.R.O. 614.—In continuation of the Election Commission's notification No. 19/39/52-Elec.III, dated the 27th December, 1952 published in the *Gazette of India Extraordinary*, Part II, Section 3, dated the 27th December, 1952 (S.R.O. 2125), under Section 106 of the Representation of the People Act, 1951 (XLIII of 1951), the Election Commission hereby publishes the judgment of the Assam High Court delivered by it on the 14th February, 1955 on an appeal filed before that Court by Shri Damodar Goswami against the judgment and order of the Election Tribunal, Gauhati, dated the 16th December, 1952, in election petition No. 39 of 1952.

IN THE HIGH COURT OF JUDICATURE IN ASSAM

CIVIL RULE NO. 126 OF 1953

Against an order, dated 16th December, 1952, passed by the Election Tribunal, Assam, at Gauhati in Election Petition No. 39 of 1952.

Damodar Goswami—*Petitioner.*

Vs.

Narnarayan Goswami and others—*Respondents.*

For the Petitioner:—

Mr. H. Goswami, Bar-at-Law, Mr. B. M. Goswami, Advocate.

For the Respondents:—

Mr. S. M. Lahiri, Mr. S. K. Ghose, Mr. F. A. Ahmed, Mr. P. Choudhury, Mr. P. K. Gupta and Mr. S. C. Bordoloi, Advocates.

PRESENT:

The Hon. Mr. Chief Justice Sarjoo Prosad.

The Hon. Mr. Justice H. Deka.

Dates of hearing:—

The 1st, 2nd and 4th February, 1955.

Date of Judgment and Order:—

The 14th February, 1955.

JUDGMENT AND ORDER

Sarjoo Prosad, C. J. The petitioner in this case is an elector of the Patac kuchi—Barama constituency of the Assam Legislative Assembly. He has sented this application under Articles 226 and 227 of the Constitution against judgment and order of the Election Tribunal, dated 16th December, 1952 prays that the said order should be quashed by a writ of *certiorari* and/or s other writ or appropriate directions as this Court may consider proper. material facts on which the petition is founded may be summarised thus:

In accordance with the Government Notification, dated 17th November, 1 the electors of the constituency to which the petitioner belongs were called u to elect two members for the Assam Legislative Assembly; the constituency be a plural members constituency comprising of two seats, one of them be reserved for scheduled tribes. There were eight duly nominated candidates the election, they all being respondents to this application. One of th Prasanna Chandra Pathak, respondent No. 8 withdrew his candidature bef the election took place. Out of the respondents, respondents Baikuntha Nath D Birendra Kumar Das and Sailendra Ramchiary, respondents 3, 4 and 6 r pectively were also eligible for election to the reserve seat for scheduled trib The polling for the said election was held on the 19th January 1952 and i counting of votes took place on the 10th February 1952 at the office premises the Deputy Commissioner of Kamrup District who was the Returning Offi for the said Constituency. The same day, the Returning Officer declared t result of the election according to which Dr. Homeswar Deb Choudhury, re pondent No. 2, was declared to have been duly returned for the general seat a Baikuntha Nath Das, respondent No. 3 was declared to have been duly return for the seat reserved for the scheduled tribes. The number of valid vot secured by the first four candidates as declared by the Returning Officer were follows:—

Dr. Homeswar Deb Choudhury	..	13,809
Narnarayan Goswami	..	13,793
Baikuntha Nath Das	..	12,994
Sailendra Ramchiary	..	12,392

The names of the returned candidates were thereafter duly announced in th local Gazette.

On the 6th March, 1952, Narnarayan Goswami presented an election petitio to the Election Commission under section 81 of the Representation of the Peopl Act, 1951 questioning the election. His case was that when the Returning Office counted the votes, it was discovered that nearly hundred ballot papers meant fo the polling of the Barpeta Parliamentary Constituency (H.P. 4) of the House o the People had been wrongly issued by the polling officer concerned for th polling of the Assembly constituency. Of these, 91 ballot papers were cast in th ballot boxes of the first four candidates in the following manner: Narnarayar Goswami 28, Homeswar Deb Choudhury 2, Baikuntha Nath Das 45 and Sailendra Ramchiary 16. The Returning Officer rejected all these ballot papers as invalid votes. Narnarayan Goswami urged that the rejection of these votes by the Returning Officer was unjustified inasmuch as the candidates or the electors were not responsible for the issue of the wrong type of ballot papers for the Assembly voters and the mistake was entirely due to the negligence of the polling officer concerned. He accordingly urged that the said votes which evidenced the intention of the electors should be taken into consideration in declaring the result of the election; and if those votes had been considered as valid votes, Narnarayan should have been declared as duly returned because he would then be deemed to have secured 13,821 valid votes as against 13,811 votes polled by his rival, Dr. Homeswar Deb Choudhury. The election was also challenged on some other grounds to which reference need not be made at present. A Tribunal was then constituted under section 86 of the Representation of People Act to hear the election petition.

The claim of Narnarayan Goswami was contested by Dr. Homeswar Deb Choudhury who supported the action of the Returning Officer and the declaration of the result made in his favour. It appears that Prasanna Chandra Pathak, who had withdrawn his nomination applied to be added as a party respondent to the proceeding before the Tribunal by an application dated 10th May 1952 and he was so added as a party by the order of the Chairman, dated 29th May 1952. He however, did not file any recrimination in the case.

The Tribunal by its order dated 16th December 1952 held that the election of Dr. Homeswar Deb Choudhury was void and Narnarayan Goswami was declared by the Tribunal to have been duly elected. For the purpose of determining whether the parliamentary ballot papers in question found as aforesaid in the ballot boxes of the Assembly candidates were in fact issued by the Polling Officer through mistake, the Election Tribunal referred to the marked electoral roll used at the Polling Station in question.

It appears that "Garbhitar Lower Primary School Polling Centre" was being simultaneously used as the polling station for election to the local Legislative Assembly as also to the House of the People of the Parliament. The station had different sections of polling booths for the two purposes; the Assembly Constituency, as observed earlier, being known as "Patacharkuchi-Barama Constituency" and the Parliamentary Constituency being called the "Barpeta Constituency", the former was a double member constituency and the latter a single member constituency. The polling officer for the two Constituencies appear to have been common. In the double member constituency, every elector had two votes, one for the general and the other for the reserve seat, subject to the condition that no elector could give more than one vote to any one candidate, and if at the time of counting it was discovered that more than one vote had been given to any such candidate then only one such vote was to be considered. With a view to eliminate the possibility of any such double voting, the polling station in the Assembly constituency was supplied with two series of ballot papers with only this difference that while the first series bore plain serial numbers, the second series bore the same serial numbers with the suffix "A", and under the rules, each elector had to be supplied with two ballot papers bearing the same serial numbers, one from the plain serial and the other from the serial with the suffix in question. In the case of the parliamentary constituency, noly one series of ballot papers were supplied which bore entirely different serial numbers. The Polling Officer, however, made an unfortunate mistake of issuing some of the ballot papers meant for the parliamentary constituency, to the voters in the Assembly constituency. The petitioner impugns the judgment of the election Tribunal on the ground that the said voting papers had been rightly rejected by the Returning Officer as invalid votes and could not be taken into account in declaring the results of the election and he therefore says that the order of the Tribunal is illegal on the face of it. He further submits that it was not open to the Tribunal to validate votes by reference to the marked electoral roll to which the Returning Officer had no access at the time of counting the votes, and that such a procedure was contrary to the mandatory provisions of rule 47(1)(c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, read with section 100(2)(c) of the Representation of the People Act, 1950-51.

It is somewhat curious that Dr. Homeswar Deb Choudhury who lost as a result of the decision of the Election Tribunal has not chosen to move this Court against the said order, though he appears to have present before this Court throughout the hearing of this petition. The petitioner, however, claims that he being an elector of the Pattacharkuchi-Barama Constituency was terested in the proper representation of the said Constituency in the Legislative Assembly and was also entitled to file an election petition calling in question the said election under section 81 of the Representation of the People Act; and inasmuch as Dr. Homeswar Deb Choudhury had taken no steps against the order of the Election Tribunal, this petitioner had to move the Court for the issue of the writs in question. No explains that before the order complained against the petitioner had no occasion to come to this Court as he was not aware of any illegality or irregularity in the conduct of the election. Homeswar Deb Choudhury has been made a party respondent before us. The petition is opposed by respondent Naranarayan Goswami who contends that the petitioner has no *locus standi* to move this Court for a writ under Articles 226 and 227 of the Constitution. It is stated that the present petitioner was not even a party to the preceding before the Election Tribunal and as such he could not complain against the judgment and order passed by the Tribunal, the persons directly affected not having impugned it. The question of *locus standi* therefore has assumed some importance in the case and will have to be examined in its proper perspective. It is also submitted by this respondent that the present application is a belated one having been filed long after the order of the Tribunal which was in December, 1952. In addition to these grounds, it is suggested that the order of the Tribunal is conclusive and a writ does not lie against it in a matter of election, especially when the Tribunal has ceased to exist and had become *functus officio*. The order of the Tribunal has also been sought to be justified on merits and it has been contended that there is nothing illegal or *ultra vires* about it.

It is in my opinion convenient to examine first of all the basis of the decision given by the Election Tribunal. It formulated the point for decision thus:— "The decision of the case thus virtually rests here on the single point, whether the above 28 votes, cast in favour of the petitioner in the ballot papers, meant for the use of the House of the People was improperly rejected by the Returning Officer....." The petitioner there, it may be remembered was respondent Naranarayan Goswami. The Tribunal found that there had been in fact interchange of ballot papers in the case due to the mistake of the officers entrusted with the conduct of the poll. It further found that the intention of the voters was to cast votes with those wrong ballot papers in favour of the candidates for the seat of the Assembly in whose boxes the ballot papers were actually found. On these findings, it held the view that the error was of a very technical character and could be condoned by the Tribunal. It also held that the statutory rules made under section 169 of the Representation of the People Act, 1951, were merely directory and any violation of the rules could be cured. In the opinion of the Tribunal, although the Returning Officer may have been justified in rejecting the ballot papers under rule 47(1)(c) as he had not the opportunity of regularising the irregularity committed by the polling officers, the Tribunal was fully competent to go into the whole question and condone such irregularity in a suitable case. On these grounds, it held the votes to have been validly cast.

The decision of the Tribunal that the statutory rules framed under the Representation of the People Act and in particular rule 47(1)(c) were merely directory and not mandatory is clearly erroneous and runs counter to the pronouncement of the Supreme Court in a very recent judgment dated 9th December, 1954 in the case of "Hari Vishnu Kamath *v.* Syed Ahmad Ishaque and others" (Civil Appeal No. 61 of 1954). Since reported in 1955 S.C.A. 105. In that case, under almost an identical situation, the Supreme Court, which had to consider the import of rule 47(1)(c) of the Rules, held that the said rule was mandatory and not merely directory. Rule 28 says:

> "The ballot papers to be used for the purpose of voting at an election to which this Chapter applies shall contain a serial number and such distinguishing marks as the Election Commission may decide."

Rule 47(1)(c) enacts that "a ballot paper contained in a ballot box shall be rejected if it bears any serial number or mark different from the serial numbers or marks of ballot papers authorised for use at the polling station or the polling booth at which the ballot box in which it was found was used." In this case, the voting papers rejected by the Returning Officer evidently bore different serial numbers not authorised for use in the booth for the polling of the Assembly Constituency. Those ballot papers were admittedly authorised for use only for the Parliamentary Constituency. That being so, the Returning Officer had no option but to reject those ballot papers in declaring the results of the election. It was argued before the Supreme Court, as it has been held by the Tribunal in this case, that the rule was only directory and not mandatory and that even if the ballot papers in question were liable to be rejected under rule 47(1)(c) yet for the purpose of deciding under section 100(2)(c), whether the result of the election had been materially affected, the Tribunal had to ascertain the true intention of the voters. Those arguments were categorically rejected by the Supreme Court. It was held that the word "shall" as used in the rule cannot be construed to mean "may". There can be no question of the Returning Officer being authorised to accept spurious or unidentifiable votes, the rule having provided that a ballot paper shall be rejected if, among others, its identity as a genuine or authorised ballot paper could not be established. Their Lordships further pointed out that under Rule 47(4) the Tribunal was constituted a Court of appeal against the decision of the Returning Officer and as such, its jurisdiction was co-extensive with that of the Returning Officer and could not extend further. The Returning Officer has no power under Rule 47 to accept votes which did not bear the distinguishing mark or the prescribed serial number, on the ground that it was due to the mistake of the Presiding Officer in delivering the wrong ballot paper. Even so, the Tribunal in reviewing the decision of that officer under rule 47(4) could not do otherwise and arrogate to itself any such power. It could not accept the ballot paper which the Returning Officer was bound to reject under Rule 47, where the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it was so expressed; and an intention not duly expressed was in the Court of law in the same position as an intention not expressed at all. The above decision of the Supreme Court completely demolishes the grounds on which the judgment of the Tribunal is based. It is manifest therefore that the Tribunal has taken into account matters which were wholly extraneous to an enquiry under section

100(2)(c) of the Representation of the People Act and has ignored the mandatory provision of rule 47(1)(c) of the rules framed thereunder. Its decisions is therefore liable to be quashed by a writ of certiorari both on the ground of error of jurisdiction and error in the construction of section 100(2)(c) read with Rule 47 of the rules, these errors being errors apparent on the face of the record.

The above decision of the Supreme Court furnishes also a complete answer to some other points raised in the counter-affidavit of Narnarayan Goswami, respondent No. 1, though not very seriously pressed before this Court in arguments. In view of their importance, I consider it right and opportune to record here a synopsis of the salient points which emerge from the judgment aforesaid. It has been pointed out there that Article 226 of the Constitution "confers on High Courts power to issue appropriate writs to any person or authority within their territorial jurisdiction, in terms absolute and unqualified and Election Tribunals functioning within the territorial jurisdiction of the High Court would fall within the sweep of that power." This power is not curtailed by Article 329(b) of the Constitution, which merely prohibits the initiation of proceedings for setting aside orders on election, otherwise than by an election petition presented to such authority and in such manner as provided therein. But when once proceedings have been instituted in accordance with Article 329(b) by presentation of an election petition,—the requirements of that article are fully satisfied. Thereafter when the Election Tribunal decides on the election petition, to what extent its decision is open to attack must be determined by the general law applicable to decisions of Tribunals and therefore a writ of certiorari will be competent against their decisions. The true scope of a writ of certiorari is that it demolishes the offending order which it considers to be without jurisdiction or palpably erroneous. "It is not a proceeding against the Tribunal or an individual composing it; it acts on the case or proceeding in the lower court and removes it to a superior court for investigation.": (Juris Corpus Secundum, Vol. XIV, page 123). The writ of certiorari is directed against the record; and if it is the record of the decision that has to be removed by certiorari then the fact of the Tribunal having subsequently become *functus officio*, can have no effect on the jurisdiction of the court to remove the record. From that point of view, a writ of this kind has to be distinguished from a writ of *prohibition* which operates on a pending proceeding. Their Lordships re-iterated the principles laid down in "T. C. Basappa V. T. Nagappa (A. I. R. 1954 S. C. 440) where it was observed:

> "In view of the express provisions in our Constitution, we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

and again, where the law justifying interference by writs under Article 226 was thus stated:

> "An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a manifest error apparent on the face of the proceedings, *e.g.*, when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision".

I have already shown that in this case, the judgment of the Election Tribunal proceeds upon an error apparent on the face of the record and a writ of certiorari would appropriately lie to demolish it.

Mr. Lahiri, however, has tried to avoid the effect of the above Supreme Court judgment in Kamath's case by contending that Rule 47(1)(c) of the Rules had no application to the case before us. He suggests that in this case, the polling station was a common polling station for both the Assembly as well as the Parliamentary Constituencies and as such, the interchange of ballot papers, though it may not have been altogether regular, did not fall within the mischief of Rule 47(1)(c). Mr. Lahiri also draws

our attention to a passage in the judgment of the Tribunal where the point appears to have been left open. The passage runs thus:

> "It was further contended, on behalf of the petitioner, however, that the irregularity, referred to by the Returning Officer, in rejecting the aforesaid ballot-papers, did not really fell within the scope of Rule 47(1) (c), inasmuch as there was really one Polling Station provided here for poll, of both the Assembly and the House of the People. and that in order to attract the application of Rule 47(1) (c), there was to be any interchange of ballot papers, as between two different polling stations, which was not the case here. The same point of a correct interpretation of the above clause was canvassed in Gidwani's case where the Tribunal accepted the view as has been urged here, on behalf of the petitioner. It is not, however, necessary for us to commit to any opinion on the point."

This distinction is not borne out by the admitted facts. It is true that there was a common polling station but it had admittedly two different sections, one for the Assembly and another for the Parliamentary election. There were therefore really two different polling booths and Rule 47(1) (c) was clearly applicable in such a case.

It is therefore necessary for me now to deal with the other contentions of Mr. Lahiri which have been set up as a plea in bar. These contentions relate to the *locus standii* of the petitioner to move this Court and the delay in the presentation of the application. The question of *locus standii* is of undoubted importance and merits serious notice. I will turn to consider this question first.

Mr. Lahiri contends that the petitioner has not shown that any of his fundamental or legal rights have been directly affected by the order passed by the Election Tribunal and even if the order is held to be illegal on the fact of it, the order should not be set aside at the instance of the petitioner. He points out that the petitioner was not even a party to the proceeding before the Tribunal, the election having been called in question by one of the unsuccessful candidates at the election. The person directly affected by the order was Dr. Homeswhar Deb Choudhury who has made no complaint against the said order. As such, the application presented by the petitioner, the learned counsel urges, should be deemed to be a frivolous application of which this Court should refuse to take any notice. The learned counsel relies upon the decision of the Supreme Court as also various other decisions of the High Courts in India to show that the emergency powers under Article 226 should be exercised only where it is necessary for the protection of a legal right and should not be invoked by any person who is unable to satisfy the Court that any such right of his has been violated or infringed. This proposition to an extent is undoubtedly correct. The language of Article 226 itself indicates that the power conferred on the High Court by the Article in question has to be exercised for the enforcement of any of the rights conferred by Part III of the Constitution,—the fundamental rights specified therein,—and for "any other purpose"; which means in other words for the enforcement of rights or obligations of a similar character. In "Charanjit Lal Chowdhury *v.* The Union of India and others" (A.I.R. 1951 Supreme Court 41), Fazl Ali, J. observed that it has been held in a number of cases in the United States of America that no one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law, and his lordship quoted with approval the dictum of Hughes J. in "McCabe *v.* Atchison" (1914) 235 U.S. 151.—

> "It is an elementary principle that in order to justify the granting of this extraordinary relief, the complainant's need of it and the absence of an adequate remedy at law must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be infured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial interference."

Chief Justice Kania in "The State of Orissa *v.* Madan Gopal Rungta" (A.I.R. 1952 Supreme Court 12) also held that the language of the Article shows that the issuing of writs or directions by the Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental Right) had been infringed and that it can also issue writs or give similar directions "for any other purpose." According to the learned Chief Justice, the words had to be read in the context of what preceded the same and therefore, the existnce of the right is the foundation of the exercise of the jurisdiction of the Court under this Article. The same view appears to have been consistently held by various courts in India. I may refer, for instance, to the decision in "Bagaram Tulpude *v.* The State of Bihar" (A.I.R. 1950 Pat. 387-29 Pat. 491 F.B.) where Meredith C. J.

pointed out that the words "for any other purpose" in the Article can hardly mean that the High Court can issue writs for any purpose it pleases and the correct interpretation was that the words meant for the enforcement of any legal right and the performance of any legal duty. To that extent, the words must be read *ejusdem generis* which was the ordinary principle of construction. My own decision in "Gopeswar Prasad Sahi *v.* State of Bihar and others" (A.I.R. 1951 Pat. 570-30 Pat. 735) and in "Mohboob Khan *v.* Deputy Commissioner, Lakhimpur and others" (A.I.R. 1953 Assam 145) as also the Full Bench decision of the Allahabad High Court in "Indian Sugar Mills Association through its President Shri Hari Raj Swarup *v.* Secretary to Government, Uttar Pradesh Labour Department and others" (A.I.R. 1951 All. 1) illustrate the same principle. It is important to remember however that all the above cases are cases of mandamus. The only case of certiorari to which my attention has been drawn by the learned counsel for the respondent is the decision in "Re P. Ramamoorthi" (A.I.R. 1953 Mad. 94) where the same principles were applied. It was held that the powers of the Court under Article 226 could be invoked only at the instance of a person who had a personal grievance against any act of the State in its executive capacity which inflicts legal injury on him. The learned Judges observed:

> "It has been held over and over again both in the United States of America and in this country that the right which is the foundation of a petition under Article 226 of the Constitution or a corresponding provision is a personal and individual right."

and reliance was placed on the basic principle laid down by the Supreme Court in *Charanjitlal's* case aforesaid. It is of course true that in the case in question, the applicant prayed for issue of a writ of a certiorari; but actually the prayer was to call for the records and to quash the order of the Governor of Madras making certain nominations to the Madras Legislative Assembly. The writ, therefore, even if available could not in any sense be described as a writ of certiorari. In substance, it was a prayer for a writ of mandamus or any other appropriate direction; and in rejecting the prayer the learned judges held that "the petitioner had no personal or direct interest in the matter of the nomination so as to enable him to invoke the provision of Article 226 of the Constitution." Mr. Lahiri has laid great stress upon the words "personal and direct interest" as used by their lordships but it is obvious that in the context, there was no violation of any interest or right of the petitioner at all. I agree that in issuing writs contemplated by Article 226 of the Constitution of the various kinds specified therein, the same rule of interpretation should be applied; but even so, the distinctions which flow from the nature and character of the writs themselves and which must, in consequence regulate and govern the issue of these writs, have to be borne in mind. Article 226 does not define the scope or character of the various writs to which it refers and for that purpose, one has to examine the English and American precedents in order to determine whether in given circumstances, a particular writ is justified. I have already, at an earlier stage, quoted the dictum of the Supreme Court in Basappa case where their lordships held that we can make an order or issue writs in the nature of certiorari in all appropriate cases and in appropriate manner so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law. This presupposes that High Courts should act upon the broad and fundamental principles which regulate the issue of writs in English law. The Supreme Court inculcated the very same principle in "Election Commission, India *v.* Saka Venkata Rao" (A.I.R. 1953 Supreme Court 210). Chief Justice Patanjali Sastri observed thus:

> "In that situation, the makers of the Constitution, having decided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the State's sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions etc. 'for any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in Englad."

Now, there is a clear and fundamental distinction between a writ of mandamus and a writ of certiorari. The writs are identical to this extent that they are extraordinary common law remedies of ancient origin. These writs are not issued as a

matter of right, but one of discretion and exceptional facts must arise to call for their use. But a writ of certiorari is always issued by a superior court to an inferior body. "It issues either as direct or appellate proceeding, or as an auxiliary or ancillary process but in all cases only to review judicial actions. The character of the act sought to be reviewed rather than the character of the tribunal should be the controlling factor in determining the right to the writ." (Ferris: Extraordinary Legal Remedies, paragraph 155). The proceeding is analogous to a review by a writ of error and it is sufficient to justify it if the facts or error complained of are stated with fullness and certainty so as to apprise the Court of the precise issues. As a general rule, certiorari will not issue at the instance of one not named as a party to the proceeding in which the judgment or order sought to be reviewed was entered. But it is not always necessary that the applicant should be in such cases a party to the record. It is enough if he be interested in the subject-matter upon which the record acts. The matter rests in the sound discretion of the Court. "If the matter to be reviewed is one which affects the public generally, an individual citizen may ordinarily invoke the remedy as may such private citizen who suffers peculiar injury by reason of a judgment or order in excess of jurisdiction." (Ferris: Extraordinary Legal Remedies, para. 174). Equity has nothing to do in a writ of mandamus and in consideration thereof, no equitable rights or principles arise. It is reserved for extraordinary emergencies being in the nature of supplementary means of obtaining substantial justice where there is clear legal right and no other adequate legal remedy. The Chief function of the writ is to compel performance of public duties prescribed by a statute and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdictions. Ferris in his book says: "Relator, to be entitled to the writ, must at least have a clear legal right to the performance by respondent of the particular duty sought to be enforced; that is there must be a clear legal right in relator and a corresponding duty on the part of the person to whom the writ is directed. No intendments are to be indulged; relator must be avertment and proof show an unqualified right to the writ. In the case of public officers the duty must be one which is clearly defined, imposed or enjoined by law as a duty resulting from the office. Absent any clear legal right of relator which it is the duty of respondent to grant, there is no substantial resting place upon which to base the application.....The office of mandamus is to execute, not adjudicate. It does not ascertain or adjust mutual claims or rights between the parties." It follows therefore that mandamus will not be granted where the right is doubtful and where the applicant has not been directly and substantially affected by the act or conduct of the public body or officer on whom the law enjoins the performance of some duty with reference to the individual concerned. It also follows from the above discussion that a writ or certiorari will be granted *ex debito justitiae* to quash proceedings which the court has power to quash where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction. This may be done on the application of an aggrieved party or even at the instance of a member of the public provided the conduct of the party aggrieved does not disentitle him to the relief. The writ is not restricted to those cases where the application is made by the party directly affected or aggrieved. It is well-known that courts and tribunals have inherent power to rectify their own mistakes and this Court in exercising its powers of superintendence now embodied in Article 227 of the Constitution can of its own motion call for the records of any case from subordinate courts and Tribunals and if their orders and judgments are found to be manifestly erroneous, set aside or quash the same. The question arises whether it should refuse to do so merely because the attention of the Court has been drawn to the manifestly erroneous record by a person not directly affected thereby. The party in such cases is more or less in the position of an amicus curise and when it comes to the notice of the Court that a particular judgment or determination is manifestly illegal or *ultra vires* it should be the duty of the Court to remove it if so satisfied. It implies in other words that where an order of the subordinate court or tribunal is without jurisdiction or apparently erroneous, the attention of the Court may be drawn to the matter by any individual interested therein praying for a writ of certiorari and the court if satisfied may grant the writ in question and remove or demolish the erroneous record. Where certiorari is the creation of statute, the discretion to be exercised by the Court depends upon the terms of the statute. The discretion to be exercised may be of the same character where a certiorari is granted at common law or the writ may take the form of the machinery of appeal to the superior Court where the statute may enable interference both on facts and law. (See Halsbury's Laws of England, Vol. 9, Page 876). In a case of mandamus on the contrary, the party seeking to move the Court must show that rights have been directly infringed and he has suffered and is likely to suffer such irreparable loss or damage that unless the extraordinary remedy is granted to him, he will not have any effective relief. The condition precedent to the issue of a writ of mandamus is that the party applying for it has a right to enforce.

A right of a member of the public to apply for a writ of certiorari would in appropriate cases fall within the ambit of a legal right or the enforcement of a legal duty as contemplated by Article 226 of the Constitution. Judged even from the standpoint of a legal right, it cannot be said that the petitioner has no such right to move this Court. It is true that Dr. Homeswar Deb Choudhury, the candidate directly affected by the order of the Election Tribunal has not moved against it. From his presence in the Court room throughout the hearing of this petition it is suggested that the petitioner is a mere mouthpiece of the said candidate. If that were so, there was nothing to prevent Dr. Choudhury from moving us in that behalf in his individual capacity, but there is evidently no doubt that he is very much interested in the result of this application. Be that as it may, the petitioner claims that he is entitled to move this Court in the exercise of his own right as an elector in the Constituency to which the election relates. He rightly claims that in a democratic set up, it is his valued and cherished right, not only to exercise his vote but also to see that his Constituency is properly represented in the Legislatures of the country and for that purpose to insist that the elections are conducted fairly and in accordance with the rules framed for that purpose so as to register the true will of the people. A violation of the mandatory rules of election affects him just as much as any other individual voter in the Constituency and in that respect he is almost in the same position as the candidate himself. Section 81 of the Representation of the People Act concedes to him an equal right with the candidates to call in question an illegal and invalid election. He did not of course approach the Election Tribunal under section 81 of the Act. He submits that he had no occasion to do so or even to know earlier about the error of the Polling Officers conducting the election in issuing unauthorised votes until the matter came to light by the judgment of the Tribunal. The Returning Officer had acted legally in rejecting the unauthorised votes and the petitioner therefore had no complaint against the order. But it is the Tribunal who set aside the order of the Returning Officer by taking into consideration the illegal and unauthorised votes, as they discovered that the mistake was attributable to the officers conducting the polls for which, in their opinion, the candidates should not suffer. For these reasons, the petitioner could not exercise his rights under section 81 of the Act and has moved this court for a writ of certiorari. The point of *locus standii* has therefore to be answered in favour of the petitioner.

It is also urged that the petition is very much belated, the order of the Tribunal itself is dated 16th December 1952 and was published in the local official Gazette on the 31st of December following and yet this application was filed in August 1953. The petitioner explains that he was waiting to see if the respondent No. 2 Homeswar Deb Choudhury would move this Court for quashing the order of the Tribunal but when ultimately he found that this respondent took no steps in the matter at all, the petitioner presented this application. There has been no doubt some delay in filing this application; and it must be observed that the writ will be generally refused in cases where the petitioner fails to show that he has proceeded expeditiously after the discovery that it was necessary to resort to it. This is especially so where public inconvenience was likely to result from its use. But one has to see in this case if the delay has been so unreasonable as to warrant a refusal of the petition. I am unable to hold in the circumstances that the delay is fatal to the grant of a writ. There is much substance in the explanation offered by the petitioner. The question of delay, in my opinion, is a very potent factor to be taken into account in throwing out an application for such writs in limine; but after the issue of a rule nisi when the court has examined the record and is satisfied that the order complained of is manifestly erroneous and illegal or without jurisdiction, the Court would be loath to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. It is also to be remembered that the law in these cases is in a state of flux and does not finally crystallise until it has reached the stage of the Supreme Court. In Kamath's case, itself, we find that the Nagpur High Court had rejected the application but the Supreme Court interfered and declared the election to be illegal. In such cases, the Court will be disinclined to enforce the rule of delay meticulously. The effect may be to necessitate a bye-election but this by itself should not be a deterrent circumstance if otherwise there is sample justification for interference, as there is in this case.

A question then arises whether we should only quash the order of the Tribunal and thereby allow the order of the Returning Officer to stand. This, of course, would be a very convenient procedure and the petitioner does not want that the writ of certiorari in this case should travel beyond that. We are, however, faced with the situation that there has been illegality in the conduct of the election itself and knowing as we do that these illegalities have affected materially the result of the election, should we allow the election to stand? The petitioner, of course, would be satisfied if only the decision of the Election Tribunal is quashed. It would not

be, however, appropriate in the circumstances of this case to quash the order of the Election Tribunal only without giving any further directions setting aside the election to the local Legislative Assembly from the Constituency to which the petitioner belongs. We notice that the Tribunal in its judgment observed thus:

> "In this connection, it may further be noted that the Returning Officer's conduct is not above some comment. It appears that such cases of interchange of ballot papers, through mistake, on the part of the Presiding and the Polling Officers had come to the notice of the Election Commission before this, and, some further instructions to guard against the same, had been issued by the Commission, which again had been circulated by the Chief Electoral Officer, Assam, among the Returning Officers by a forwarding note, a copy of which is marked Ext. 6. In paragraph 2 of the letter, a valuable suggestion was made in this regard, which was that before opening the ballot box for counting, the Returning Officers should refer to the account in form No. 10, as is to be submitted by each Presiding Officer, with a view to ascertain if there had, in fact, been any wrong issue of ballot papers, and in the event of such a discovery, to report the matter to the Election Commission for regularising the irregularity. The Returning Officer, in the present case, explained his difficulty by stating that the Presiding Officer of this particular Centre had indeed returned the form No. 10 blank. If so, the more was the reason for his being on the guard."

We agree with the Tribunal that the officers responsible for the conduct of this election should have shown better sense of responsibility, especially when the Election Commission had taken such elaborate precautions and given such minute and detailed instructions in order to safeguard and ensure the conduct of the election on proper lines and in accordance with the law and rules of procedure laid down for the purpose. In view of the illegality vitiating the election, we think that it would only be right that we should direct the election also to be set aside.

The application therefore is allowed and the order of the Election Tribunal dated 16th December, 1952 is set aside. We further direct that in view of the above illegalities the election held on the 19th of January 1952 in respect of the Pattacharkuchi-Barama Constituency to the Assam Legislative Assembly should also be set aside and the authorities if so advised may hold a fresh election for that purpose. In the circumstances of this case, there will be no order for costs of this application.

(Sd.) SARJOO PROSAD,
Chief Justice.

I agree.

(Sd.) H. DEKA,
Judge.

Leave to appeal to Supreme Court is asked for and is refused.

(Sd.) SARJOO PROSAD,
Chief Justice.

(Sd.) H. DEKA,
Judge.

[No. 19/39/52-Elec.III/3600.]

By order,

K. S. RAJAGOPALAN, Asstt. Secy.

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